

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7041

To be argued by:
Eugene Gressman

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-7041

RUDOLPH V. ALOSIO,

Plaintiff,

v.

IRANIAN SHIPPING LINES, S.A., et al.,

Defendants.

ATLANTIC STEAMERS SUPPLY CO., INC.
OF PENNSYLVANIA, et al.,

First Intervening Plaintiffs,

v.

IRANIAN SHIPPING LINES, S.A., et al.,

Second Defendants.

IRANIAN SHIPPING LINES, S.A.,

Cross-Claimant-Appellant,

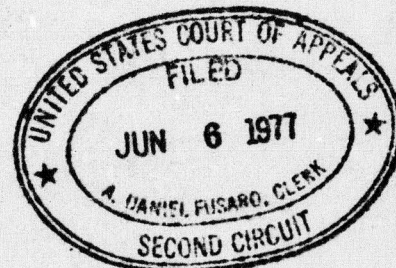
v.

PETER MORAITES, et al.,

Impleaded Defendants-Appellees.

On Appeal from Summary Judgment Order of
the United States District Court for
the Southern District of New York
(Werker, J.)

BRIEF OF APPELLANT
IRANIAN SHIPPING LINES, S.A.



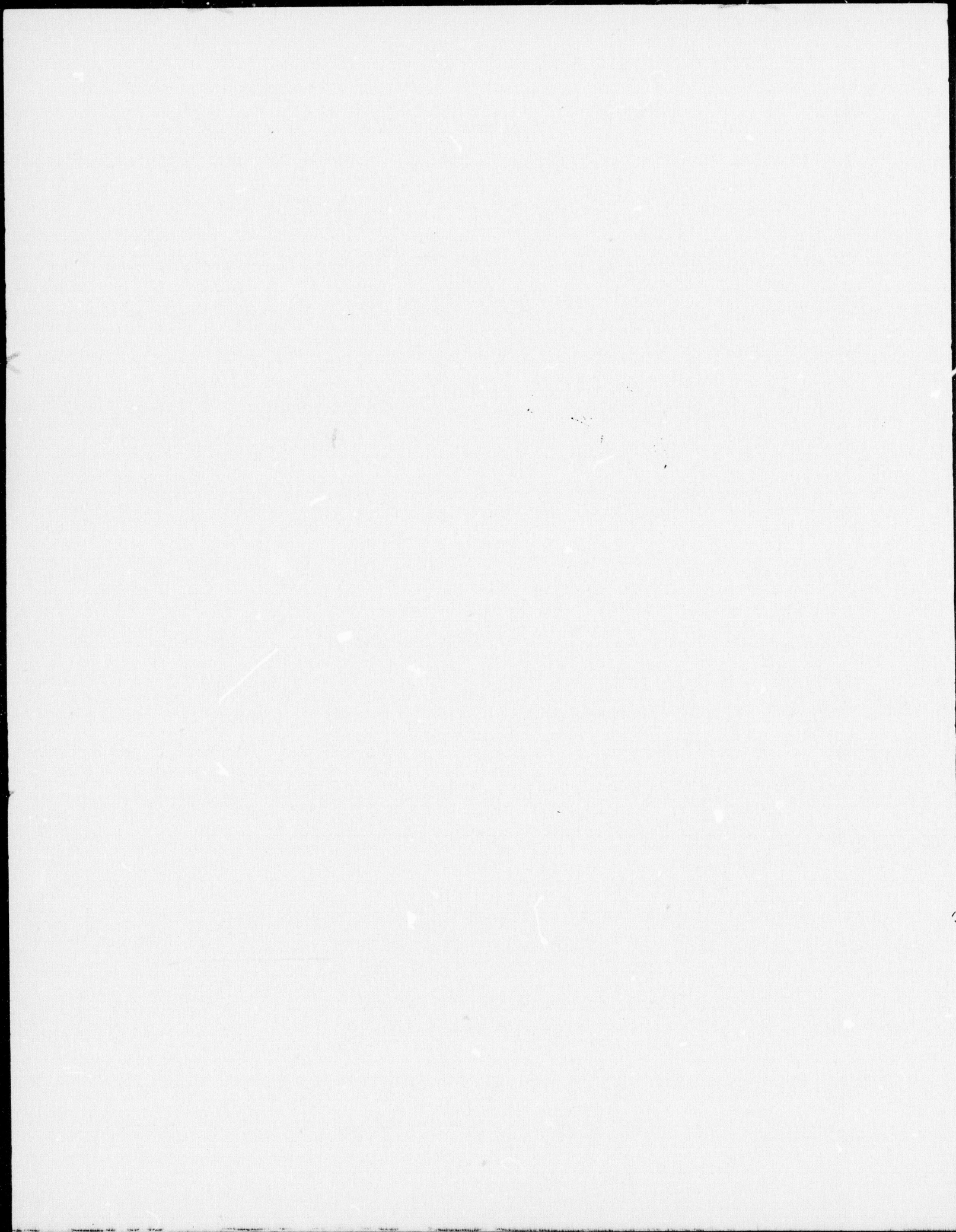
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BRIEF OF APPELLANT IRANIAN SHIPPING LINES, S.A.

This is an appeal from an order entered on October 21, 1976, in the Southern District by the Honorable Henry F. Werker. That order, which is unreported, granted summary judgment in favor of the appellees and dismissed the appellant's cross-complaint, alleging violations of the federal antitrust laws. The court's memorandum decision is reproduced at App. 319-325; its judgment is reproduced at App. 326-329.

ISSUES PRESENTED

1. Whether a dissolved Iranian corporation has "capacity" to maintain a federal antitrust suit, within the meaning of Rule 17(b), Fed. Rules Civ. Proc., where the Iranian Commercial Code permits such an entity to sue and be sued.

2. Whether, under Rule 17(b), Fed. Rules Civ. Proc., a federal court must apply the law of the forum in determining whether a former director, holding a special authorization from a foreign corporation, can manage and maintain in a representative capacity an antitrust cross-claim filed on behalf of that corporation.

3. Whether, under Rule 56, Fed. Rules Civ. Proc., summary judgment can properly be entered where (a) the opposing party was given no notice of any prehearing conference on the motion and was denied the opportunity to submit opposition to a reply affidavit that had altered the nature of the motion; (b) the motion rested on two affidavits by the same person that were inconsistent with each other; (c) the court ignored the inferences most favorable to the party opposing the motion; and (d) the court tried and resolved issues of fact that should have been left for trial.

FEDERAL RULE INVOLVED

Rule 17(b), Federal Rules of Civil Procedure:

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity,

to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§754 and 959(a).

STATEMENT OF THE CASE

On October 21, 1976, Judge Werker entered an order, on motion for summary judgment, that dismissed a cross-claim filed under the federal antitrust laws by the appellant herein, Iranian Shipping Lines, S.A. (ISL). That antitrust cross-claim had been filed in 1972, had survived motions to dismiss, and had resulted in extensive discovery proceedings. But before the cross-claim could be brought to trial, the appellees in 1976 raised for the first time objections to the capacity of ISL and its representative to maintain the antitrust cross-claim. Those were the objections that led to the dismissal of the cross-claim.

But a proper understanding of the cross-claim necessitates a review of the complex and prolonged litigation out of which it arose. Actually, the present appeal can be traced back to 1967, when Rudolph V. Alosio, as a creditor, brought suit in the Southern District against what purported to be an Iranian corporation, ISL. Alosio v. Iranian Shipping Lines, S.D.N.Y., No. 67-Civ-9. An amended complaint was filed in 1968 naming various other defendants, and other creditors were allowed to intervene as party plaintiffs. As Judge Frankel pointed out in his memorandum opinion in the Alosic case, 307 F.Supp. 1117, 1119 (S.D.N.Y. 1970), the verified complaint (as amended) and the affidavits in that proceeding - all of which were unrefuted - showed that the defendants had:

- (1) . . . used an unfinanced or inadequately financed corporate husk [ISL] to defraud those they dealt with.
- (2) They opened illegal bank accounts and used them to siphon money out of the corporation [ISL] to pay personal obligations.
- (3) They diverted corporate revenues to themselves.
- (4) They drove ISL into insolvency as a means of waging personal financial warfare.

These charges, which were amply proved in subsequent discovery proceedings, were translated by ISL into a federal antitrust cross-complaint in 1972. That cross-complaint alleged

a wrongful conspiracy in violation of the antitrust laws. The purposes of the conspiracy were alledged to be: (a) the elimination of a competitor, ISL, from the business of shipping goods by sea between the United States and the Persian Gulf, and (b) the monopolization of that business by Arya Shipping Lines, S.A. (Arya), and the companies and persons associated with it.^{1/} Among the defendants named in this cross-complaint were those named in the complaints of Alosio and other intervening creditor plaintiffs (including the Manta family Defendants), plus Arya.^{2/}

The cross-complaint of ISL identified itself (par. 1) as "a corporation organized and existing under the laws of Iran." The answer of the Manta defendants admitted "that ISL is a corporation organized under the laws of Iran," but the Arya answer denied "knowledge or information sufficient to form a belief as to the truth" of the allegation in par. 1 that ISL was an

^{1/} ISL had been the first entity to own and operate ships of Iranian registry in a regularly scheduled dry cargo liner service between ports in the United States and ports in the Persian Gulf.

In that service, which ISL inaugurated in March-April of 1965, ISL employed a number of chartered vessels in addition to three Iranian-flag vessels that ISL owned free and clear of any lien or mortgage. During the approximately eleven months of ISL's operations, gross revenues were in excess of \$6,500,000. ISL's financial collapse, due to the various factors summarized above, occurred in May-June of 1966.

^{2/} Once the cross-claim was filed, technical objections were raised as to ISL's right to file the cross-claim and its right to bring in as additional parties those named as defendants in the cross-claim who had not previously been named in the litigation, e.g., Arya. ISL sought to avoid these objections by filing an independent complaint making the identical antitrust charges against the same defendants. This new action was numbered 72 Civ. 1392.

Iranian corporation. None of the answers contained any "specific negative averment," within the meaning of Civil Rule 9(a), challenging the capacity of ISL to sue or challenging the capacity of Nick C. Spanos to institute and manage the cross-complaint on behalf of and in the name of ISL. See App. 181, 183, 197, 204.

As all parties were aware, Spanos had long held a 48 percent stock interest in ISL. He was also a co-managing director of ISL, having been reelected to the board of directors in 1965 for a stated term of four years. On March 28, 1964, Spanos received the following special authorization by means of a resolution adopted by the ISL Board of Directors (App. 64):

2. That Mr. Nick C. Spanos is appointed legal attorney of the Board of Directors, with full power and authority to negotiate [sic], pursue, commit, sign any act or a action required by the Company and on behalf of the Company and sign alone. Mr. Nick C. Spanos is also authorized to institute legal action against any person [sic] and/or party for the collection of all funds due, and owed to the Company.

Pursuant to that authorization, Spanos helped prepare the ISL antitrust cross-complaint and signed it as one of the attorneys for ISL. Indeed, at this time, there was no other director, manager, attorney or stockholder of ISL who was willing to represent ISL's interests, or who had even sought to represent or protect those interests.

In May of 1972, various defendants filed motions to dismiss the ISL antitrust cross-claim on the ground that, inter alia, the

filing of the cross-claim was "not the authorized act of IRANIAN SHIPPING LINES . . . nor of any of its duly-authorized directors or stockholders." It was also asserted that ISL did not have "the standing to initiate such Cross-Claim." App. 11. After full briefing and oral argument, these motions were denied by Judge Brieant on September 29, 1972. App. 147. That order of denial contained the following relevant passage (App. 148):

ISL effected a general appearance in this action on June 10, 1968 by the filing of an answer. Persons within the corporation having standing to question Spanos' authority have remained silent since that time. The resolution of the Board of Directors of ISL dated March 28, 1964, appears to be in order and so far as any factual evidence proffered on this motion is concerned, is still in force and effect. This resolution purports to grant Spanos authority to "institute legal action against any person and/or party for the collection of all funds due and owed to the company" (Exhibit 1 to cross-claimants reply affidavit, filed June 2, 1972). If Spanos could be shown to lack actual authority he has, at the very least, apparent authority, with which he has been clothed by an act of the corporation. Because the corporation invested him with such apparent authority, and additionally, because of laches since 1968, all proceedings conducted without actual notice of any claimed infirmity in Spanos' agency, are valid and binding on the corporation and all persons claiming from, through or under it.

One other than the principal himself contesting the apparent authority with which an agent is clothed, must present facts and not mere argument and conjecture.

Shortly after the aforesaid motions to dismiss were filed in May of 1972, ISL filed a motion to join Spanos individually as a co-crosscomplainant in the antitrust action and to allow

him to plead any corporate causes of action derivatively as a shareholder, as well as to seek any personal relief. That motion was denied on September 29, 1972, by Judge Brieant on the ground that since Spanos "is presently being permitted to manage this litigation in behalf of ISL," there is "no present need for him to be named as a shareholder suing derivatively in the right of the other shareholders in this Iranian corporation." App. 146. Such procedure was felt to be unnecessary and "would unduly proliferate this already complicated litigation." Judge Brieant's order concluded by stating (App.146):

If in fact Spanos is a stockholder . . . and in the event that at some future time the corporation is incapacitated from continuing the litigation, either by a court appointed trustee, a receiver or by its co-managing director, Spanos, then, and in any such event, the motion may be renewed."

The period between 1972 and 1976 was consumed with various motions not here relevant and with futile efforts to secure answers to interrogatories addressed to Arya, one of the appellees herein.

On May 28, 1976, the Manta Defendants filed a request to admit pursuant to Civil Rule 36, a request that also constituted a notice under Civil Rule 44.1 that those defendants intended to raise an issue concerning the law of a foreign country, and to offer as proof of the Iranian law an affidavit from a leading Iranian law expert, Dr. Hassan Sotoudeh. App. 219. ISL was requested to admit the truth of certain assertions in an attached

affidavit of Dr. Sotoudeh that the requirements of Iranian law, compliance with which was necessary to the valid incorporation of ISL, had not been met. The critical portion of this affidavit asserted that if the organizers of an Iranian corporation had not complied with certain specified portions of the Iranian Commercial Code of 1932, then under Article 220 of that Code the purported corporation would be treated as a general partnership. App. 234.

Based on the same affidavit, ISL on June 8, 1976, served substantially the same requests for admission on the Manta Defendants. App. 242. On June 29, 1976, ISL responded to the original request and admitted one or more of the facts essential to the conclusion that ISL had never been properly incorporated. App. 289-290. On July 7, 1976, the responses of the Manta Defendants made a similar admission. App. 293-296.

Nothing further developed from these admissions. Nor were they referred to in the ensuing summary judgment proceedings before Judge Werker. But it is noteworthy that Judge Werker, having presided at a prior hearing in September of 1975 on the Manta Defendants' refusal to admit to the truth of this same affidavit of Dr. Sotoudeh, was fully aware of the dubious nature of ISL's incorporation when he was confronted with the motions for summary judgment. See App. page T.

The initial motion for summary judgment was filed by Arya on June 22, 1976, seeking dismissal of ISL's antitrust cross-claim.^{3/} As grounds for that motion, Arya asserted that ISL "has been dissolved involuntarily under applicable Iranian law, the law under which cross-claimant was purportedly organized, and, consequently, that it lacks the requisite capacity to maintain this litigation." App. 253. The Manta Defendants and other defendants later joined in this Arya motion. App. 299, 301.

Attached to the Arya motion were (1) an affidavit of one Musa Sabi, a purported expert on Iranian law, (2) a statement of material facts, and (3) a memorandum of law. Annexed to the affidavit were complete translations of the Iranian Commercial Code of 1932 and the revised Commercial Code of 1969. In essence, the analysis by Musa Sabi purported to show:

1. ISL, "if it ever validly existed, has been dissolved under the laws of Iran since April 27, 1973." Nowhere does Musa Sabi say, however, that ISL was validly organized or ever "validly existed" as a corporation. This is significant since the Iranian laws respecting dissolution of corporations obviously apply only to "validly existing" corporations. But Arya's supporting memorandum (p. 2), misstated its own expert's averments by stating as a "relevant fact" that "ISL was organized in 1961 as a 'Joint Stock Company' under the Commercial Code of Iran . . ." See App. 255.

^{3/} Arya never gave any notice under Civil Rule 44.1 that it intended to raise an issue of foreign law.

2. The 1969 Code revisions required that all pre-existing joint stock companies transform themselves into either public or private joint stock companies, or into some other form of organization.

3. The 1969 Code revisions provided a three-year grace period for making these transformations and further provided that all joint stock companies failing so to transform themselves within the grace period would be dissolved. This three-year grace period was extended one year by the Iranian Parliament, so that it expired on April 27, 1973.

4. ISL never consummated any transformation, as required, and thus was considered as having been dissolved as of April 27, 1973.

ISL did not contest any of the foregoing assertions in its opposition to the summary judgment motions. But it did vigorously protest and deny the final conclusion drawn in paragraph 12 of Musa Sabi's affidavit (App. 260-261):

And, as a non-entity under the laws of Iran, ISL lacks any corporate capacity whatsoever, including the capacity to prosecute this or any other litigation.

That conclusion was paraphrased in paragraph 6 of Arya's statement of material facts in this fashion (App. 256):

Under Iranian law, ISL is considered as having been dissolved as of April 27, 1973, and, therefore, lacks the capacity to maintain this litigation.

ISL's counter-statement of material facts read as follows
(App. 298):

1. Paragraph No. 6 in the Rule 9(g) Statement of Arya Shipping Lines, S.A. ("Arya") is specifically controverted in that it is not a fact that ISL lacks capacity to maintain this litigation by reason of its dissolution under Iranian law.

2. There exists no genuine issue to be tried as to the following material facts:

A. Upon its dissolution as of April 27, 1973, ISL was subject to the liquidation proceedings stipulated in the 1932 Commercial Code of Iran.

B. Under the said 1932 Code, ISL has the capacity to maintain the present litigation.

These statements were elaborated in ISL's accompanying memorandum of law, which argued that under the law of Iran a dissolved corporation has the legal capacity to have actions brought and defended in its name and to have its affairs wound up, including the collection of monies due it, after its dissolution.

ISL's assertion that under Iranian law a dissolved corporation retained capacity to sue and be sued inspired Arya to secure a supplemental or reply affidavit from Musa Sabi. App. 305 . The highlights of that reply affidavit are:

1. Musa Sabi labeled as incorrect the ISL claims that it had capacity to maintain this litigation, even though admittedly it had been dissolved under Iranian law as of April 27, 1973.

He reiterated that a dissolved company like ISL has "absolutely no corporate capacity under Iranian law to prosecute this or any other litigation." Capacity to maintain the litigation was said to have "immediately ceased upon the dissolution of ISL as a corporate entity." App. 306.

2. Musa Sabi then proceeded to concede that "the status of claims that may have accrued in favor of" ISL "are governed by the liquidation proceedings set forth in the 1932 Code." App. 306. Liquidation proceedings under these provisions, according to Musa Sabi, can be commenced in one of two ways: (a) adoption of a resolution by the shareholders at a meeting called to wind up the company, or (b) entry of an order by the Court of First Instance in Iran upon application of any interested party. No such resolution or court order was ever recorded with reference to ISL. App. 306-307.

3. Musa Sabi then undertook a detailed examination of Spanos' authority to maintain this action on behalf of ISL. He concluded: (a) Spanos' term as director or managing director of ISL had expired in 1969, and there is no provision in Iranian law for a "holding over" beyond the expiration of a term of office; (b) Spanos' authority to institute legal actions on behalf of ISL, acquired by the 1964 resolution, terminated either on May 31, 1969 (when his term as director expired), or on April 27, 1973 (when ISL was considered dissolved). In short, Musa Sabi concluded that "Spanos simply has no authority under Iranian law to prosecute this litigation." App. 308; emphasis added.

ISL was prevented by Judge Werker from responding in any way to this reply affidavit of Musa Sabi. See App. 347-348. And no oral argument was permitted. Acting on the papers alone, Judge Werker concluded in his memorandum decision of October 21, 1976 that (App. 323):

The court concludes that ISL has been dissolved under Iranian law and that Spanos cannot continue its cross-claim against Arya and the other defendants.

Arya's motion for summary judgment was accordingly granted, and the antitrust cross-claim was order dismissed.

Judge Werker's decision was premised on the provision in Rule 17(b) that the capacity of a corporation "to sue or be sued shall be determined by the law under which it was organized." And he turned to the Iranian Commercial Code, as interpreted by Musa Sabi, in finding that ISL had been dissolved, that ISL was subject to liquidation proceedings following dissolution, but none had ever been instituted, and that Spanos' authorization to bring suit as a director had expired in 1969 when his director's term expired. But in finding that Spanos' authorization expired in 1969, Judge Werker ignored Musa Sabi's admission that the authorization did continue until the dissolution in April of 1973. App. 309-310. In footnote 3 of the memorandum decision below, Judge Werker openly acknowledged that he disagreed with Judge

Brieant's 1972 ruling that this authorization was in full force and effect at the time the antitrust cross-claim was filed. App. 325. Judge Werker said that he did so "because Arya has adduced further facts for the court's consideration at this time." What those "further facts" were is not made evident. If anything, the "further facts" consisted of the two Musa Sabi affidavits, the second of which stated that Spanos' authorization continued until April 27, 1973 - after the cross-claim was filed.

In an April 5, 1977, memorandum decision, granting a motion to extend the time for filing the notice of appeal in this case for reasons of "excusable neglect," Judge Werker referred to his October 21, 1976, dismissal of the antitrust cross-claim as having been based "on the ground that neither Nick C. Spanos nor Iranian could maintain it under controlling Iranian law."^{4/} App. 390. And in a subsequent memorandum decision denying leave to certain creditors to intervene in the remaining creditors' actions, dated April 15, 1977, Judge Werker stated that the dismissal of the antitrust counter-claim had been premised "upon a finding by this court that Nick C. Spanos, one of ISL's managing directors, lacked the capacity under Iranian law to bring suit on ISL's behalf." Alosio v. Iranian Shipping Lines, et al., S.D.N.Y. No. 72 Civ. 1392, April 15, 1977, pp 2-3.

^{4/} In a footnote to this statement, Judge Werker further said: "The court held that Iranian had been dissolved under controlling provisions of the Commercial Code of Iran of 1932. It also found that Spanos could not proceed as either a corporate liquidator or Iranian's managing director." App. 398.

ARGUMENT

The decision below raises novel and important problems in the interpretation and application of Rule 17(b) of the Federal Rules of Civil Procedure. The substantiality of those problems is augmented by the fact that Rule 17(b) has been used in this instance to secure the dismissal of a serious and in large part proven claim under the antitrust laws of the United States.

As a result, this case is infused with a large amount of public concern and interest. Whatever the decision of this Court, it is bound to be a landmark in the jurisprudence surrounding Rule 17(b), particularly as that rule conditions the access of foreign corporations to the federal courts in order to implement the public interest implicit in enforcing the antitrust laws of the United States.

Compounding these matters of public importance is the further fact that the court below has misread Rule 17(b) in several respects, causing the decision to be a dangerous and unfortunate precedent. It has confused, and been confused by, the distinct provisions in Rule 17(b) dealing with corporations and individuals suing in a representative capacity. Further, it has sanctioned misuse of the summary judgment procedures of Rule 56.

I.

The court below has misconceived the Rule 17(b) reference to the capacity of corporations to sue and be sued.

The second sentence of Civil Rule 17(b) states:
"The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." That is the provision, the sole provision, upon which the decision below purportedly rests. In effect, it ruled, as Arya and the other movants contended, that under the law of Iran - where ISL had purportedly been validly organized - ISL was considered dissolved as of April 27, 1973, and thus had no capacity to maintain or continue this antitrust counter-claim after that date.

Therein lies the court's total misconception of the second sentence of Rule 17(b). That sentence makes the corporation's capacity to sue and be sued dependent upon the law of the state or country of incorporation - in this case, Iran. But as Judge MacMahon has ruled in the leading case on this matter, this Rule 17(b) reference to "capacity" means only a "general capacity" under the law of the state of incorporation. In his words in Joseph Muller Corp. Zurich v. Societe Anonyme De Gerance, 314 F.Supp. 439, 441 (S.D. N.Y. 1970):

At first glance, Rule 17 would appear to allow the state or nation under whose laws a corporation is organized to grant the corporation the capacity to sue and immunize it from being sued anywhere except in the state or nation of incorporation.

"Capacity to sue or be sued," however, as used in the Rule was, in order to obviate this problem of creating immunity, intended to mean the general capacity to sue or be sued. The laws under which a corporation is organized either grant or withhold the capacity to sue or be sued, and the Federal Rules look to the laws under which a corporation is organized to determine if a corporation has been granted this general capacity.

Once it is determined that a corporation has the general capacity "to sue or be sued," the Rule is satisfied . . .

See also John W. Johnson, Inc. v. Atlantic States Constr. Co., 276 F.Supp. 379 (D. Md. 1967); Johnson v. Helicopter & Airplane Services Corp., 404 F.Supp. 726, 729 (D. Md. 1975). Or, as succinctly put in 6 Wright and Miller, Federal Practice and Procedure, §1561, p. 733 (1971):

It is generally recognized that the second sentence of Rule 17(b) relates only to following state law with regard to corporate capacity to sue and be sued, and not to the place of suit. Consequently, if a corporation is empowered to sue or be sued in its state of organization, then it can sue or be sued in any federal court.

The same concept of "general capacity" is evident as to dissolved or defunct corporations. As Wright and Miller, supra, have written in §1563, pp. 738-739:

Although not expressly dealt with in Rule 17(b), the federal courts have held that the capacity of a dissolved corporation to sue and be sued is determined by the law of the state in which it was organized. Accordingly, as long as the entity's capacity to litigate is continued by the state of its incorporation, the principles discussed. . . relating to private corporations apply to dissolved corporations.

It follows that the sole inquiry in this case should have been whether the law of Iran recognized the general capacity of ISL to sue and be sued after its dissolution in 1973. On that score, the evidence below is crystal clear. The discussion in the opinion below concerning Iranian law,^{5/} as well as the second Musa Sabi affidavit, amply demonstrate that a dissolved Iranian corporation has general capacity to sue and be sued. True, Iran requires that the shareholders authorize any such suit, or that a court order be obtained by some interested party. But those conditions or requirements obviously do not affect or detract from a dissolved corporation's general capacity to bring suit. Indeed, those requirements confirm that general capacity. Sections 207 and 209 of the 1932 Commercial Code of Iran (App.288) make it clear that upon dissolution the liquidators of a corporation may "collect its debts," "distribute the assets," and "bring and defend actions in the company's name, either in person or by attorney." Such authority on liquidation can be possessed only by an entity that retains a general capacity to sue and be sued. All that the authorizing requirements mean is that such capacity may be activated in Iran by compliance with one of them.

^{5/} The court below noted with approval Arya's argument that the Iranian law "contains no savings statute whereby the automatic incidents of corporate death are suspended for a specified period of time." App.320-1, emphasis added. That is an acknowledgment that a savings statute of unlimited duration does indeed exist after dissolution, thereby indefinitely maintaining the dissolved corporation's general capacity to sue and be sued.

The decisions of the Supreme Court in Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257, 260 (1927), and Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120, 125 (1937), confirm this analysis of the continuing capacity of ISL to maintain this action as a dissolved corporation. In both those cases, the Court emphasized that, while dissolution may put an end to a corporation's existence and to its right to sue and be sued, there may be "some statutory authorization for the prolongation of its life, even for litigation purposes." 302 U.S. at 125. In the Oklahoma case, the the Court found just such a prolongation of litigation life - or capacity to sue and be sued - in an Oklahoma statute that appeared to do just what the Iranian Commercial Code does with respect to dissolved corporations - i.e., a statute that allowed the corporation directors or a court-appointed person "to collect and pay debts" and "to maintain or defend actions in their own names by the style of the trustees of such corporation dissolved." 273 U.S. at 260.

Moreover, an intolerable situation would arise if Rule 17(b) were interpreted to mean that the capacity of a foreign corporation to bring and maintain an antitrust action in a federal court is dependent upon compliance with the procedural requirements or conditions for bringing suit in the jurisdiction where the entity was incorporated. As Judge Palmieri once said in a very parallel antitrust context,

"Since the assets involved in this litigation are in America, the issue of plaintiff's capacity to seek adjudication on the merits in this court is to be determined by our national policy." Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F.Supp. 814, 815 (S.D. N.Y. 1961). That is to say, once the federal court is satisfied that foreign law has given the dissolved corporation general capacity to sue, the precise conditions for bringing an action in a federal court are to be dependent on the rules governing federal causes of action, if not the law of the forum state.

Indeed, as Judge Friendly said in Klebanow v. New York Produce Exchange, 344 F.2d 294, 299 (C.A. 2, 1965), a federal antitrust case, even if the law of the state of incorporation "returns only a murky answer to the question of capacity posed by F.R.Civ.P. 17(b), federal judges are entitled to resolve the doubt in a way that permits the assertion of a federal claim." On this point Judge Friendly cited Leh v. General Petroleum Corp., 165 F.Supp. 933, 936-937 (S.D. Cal. 1958), where it was said that

. . . necessity and policy combine to dictate that the question whether this federal court action on a federally-created partnership [antitrust] claim can be decided on the basis of "federal law . . . [fashioned] from the policy of our national [antitrust] laws." . . . This follows not only because the law of the State in which the partnership was created and transacted business can be of no aid, but also because the problem here concerns the enforcement in a federal court of a right created by

Congress; and federal law, not state law, must control in determining the rules governing enforcement in federal courts or rights and remedies created by federal statutes.

* * * * *

However, it can be postulated with some certainty that it is not the policy of our national antitrust laws to discourage private treble damage actions such as this. To the contrary, "Congress itself has placed the private antitrust litigant in a most favorable position . . ."

* * * * *

These considerations and the "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action" [citing cases], compel the holding that prosecution of an action for treble damages for claimed injuries to the business of a partnership allegedly caused by violations of the Federal antitrust laws is an "act appropriate for winding up partnership affairs" . . . , so that one partner of a dissolved partnership in the process of winding up may prosecute such an action in the partnership name [Fed.R.Civ.P. 17(b)] in the Federal court.

In sum, the court below erred in allowing the parochial procedural laws of Iran to control access to the federal courts to implement the antitrust policies of the United States. It was enough to find, as the court implicitly did, that the law of Iran recognizes that a dissolved corporation has a general capacity after its death to sue and be sued.

II.

The court below has ignored and misconceived the Rule 17(b) reference to the capacity of a fiduciary representative to sue and be sued.

In assessing the capacity of Spanos to continue ISL's antitrust claim, the court below made no reference other than to the second sentence of Rule 17(b), as if the corporate capacity to sue somehow controlled Spanos' capacity to manage the suit on behalf of ISL. Not one word of reference was made to the third sentence of Rule 17(b). That sentence plainly says, read in conjunction with the first sentence that "The capacity of an individual . . . acting in a representative capacity, to sue or be sued . . . [i]n all other cases . . . shall be determined by the law of the state in which the district court is held . . ."

Instead, the court below seemingly determined Spanos' capacity to manage the antitrust case for ISL entirely in the light of:

1. The purported law of Iran, as interpreted by Musa Sabi's reply affidavit, that was said to compel the conclusion that the express power of directors to "carry out" liquidation proceedings under Article 203 of the 1932 Commercial Code does not authorize them to bring actions [as liquidators] in the company's name. App. 322.^{6/} But it should be noted that

^{6/} The court said that, were it not for the affidavit of Musa Sabi, it might have read the Commercial Code differently in this respect. App. 323.

Spanos never relied on his position as a director as authority for managing the antitrust case; he claimed authority only by virtue of the 1964 resolution. App. 59.

2. The court's difficulty in believing that the 1964 resolution "was intended to authorize Spanos to act as a liquidator," particularly since it was passed four years before "the need to reorganize ISL arose and almost eight years before the dissolution took effect." App. 323. But the only evidence on the intent of the resolution came on the deposition of Spanos on the issue of his authority; he there testified that it was intended to be a continuing and ongoing authorization. See transcript of Manta examination of Spanos, pp. 2196-2198, 2236-2237, the same examination referred to in paragraph 5 of the Musa Sabi reply affidavit. App. 307.

3. The court's conclusion, based upon the Iranian Commercial Code and the ISL articles of association, that the authorization expired "long before the cross-claim was filed" - i.e., when Spanos' term as director expired on May 31, 1969. App. 323.

The court made no effort, however, to assess Spanos' capacity, in terms of the 1964 authorization, by reference to what the third sentence of Rule 17(b) calls "the law of the state in which the district court is held."^{7/} Had such a reference

^{7/} The opinion below did cite New York Business Corporation Law §703(b) (McKinney 1963), but immediately distinguished it as being different from what the court deemed to be the controlling law of Iran. App. 323.

been made to the law of New York, the court below would have had to conclude that the 1964 authorization remained fully effective. Particularly is that so since New York law provides that, upon dissolution, the legal title to all corporate property and assets and the right to pursue all remedies to collect such assets automatically vest in the last directors as trustees. See New York Business Corporation Law §703(b) (McKinney 1963); In re Bonnie Classics, Inc., 116 F.Supp. 646, 648 (S.D. N.Y. 1953); In re Baldwin Trading Corp., 8 N.Y.2d 144, 147-148, 202 N.Y.S.2d 312, 313-314 (1960); Sinnott v. Hanan, 214 N.Y. 454, 108 N.E. 858 (1915); Marine Trust Co. of Buffalo v. Tralles, 263 N.Y.S. 750, 147 Misc. 426 (1933). And since Spanos was one of the last directors and since no one else was seeking to pursue ISL's antitrust cause of action, the New York law would have permitted Spanos to continue to manage the case by extending the effectiveness of the 1964 authorization - which Judge Brieant had found to be unrevoked as late as 1972.

To the extent that the court was empowered to make its own examination and assessment of the 1964 resolution, apart from any requirements of New York law, the record below totally fails to support the court's interpretation of the resolution. There was no evidence whatever that the corporate directors did not intend this resolution to be a continuing and open-ended one. Nor was there any new evidence that differed from what was before Judge Brieant in 1972, when he determined that the resolution was valid and still effective despite the passage

of time. Under these circumstances, the court below should have considered the 1972 adjudication to be the law of the case respecting the capacity of Spanos to manage this litigation.

III.

The court below entered summary judgment in violation of several principles governing Civil Rule 56.

The court below committed a variety of procedural errors in entertaining and then granting a summary judgment motion dismissing a valid federal antitrust action.

1. Contrary to what Judge Werker has described as his "established procedure,"^{8/} ISL was given no notice of any pre-motion conference on the Arya motion for summary judgment. If there was a conference, ISL was not notified of it. As a result, ISL was denied the benefits that a discussion of Arya's motion with the judge might have produced. Much of the confusion and inconsistencies between the summary motion theory expressed

^{8/} The established procedure calls for the moving party to have his motion papers served on all other parties, who are not required to respond until after a conference with the court respecting the motion. See transcript of February 4, 1977, conference with Judge Werker, pp. 4 (lines 5-11), 7 (lines 11-12), 8 (lines 19-25) 9 (lines 1-7), 10 (lines 7-10), which is part of the certified record in this appeal. App. 360-376.

in the first Musa Sabi affidavit and the theory expressed in his reply affidavit might have been eliminated. As it was, ISL was given a chance to respond only to the first affidavit, while being denied any opportunity to respond to the entirely different facts and contentions set forth in the reply affidavit.^{9/}

2. Summary judgment was improperly granted for three reasons:

(a) The two affidavits submitted by Musa Sabi were inconsistent in that the first affidavit flatly asserted that ISL lacked any corporate capacity to litigate this or any other suit, while the second affidavit conceded that ISL did have capacity to sue had it followed the preceudural liquidation requirements of Iranian law. This inconsistency raised an issue of veracity, which vitiates both affidavits and precludes any entry of summary judgment based thereon. See Peckham v. Ronrico Corp., 171 F.2d 653, 658 (C.A. 1, 1948). Such inconsistencies could only be resolved at a trial, where the affiant could be cross-examined.

(b) The full record before Judge Werker included

^{9/} See affidavit of Jonathan Lubell, attorney for ISL, dated January 14, 1977. App. 336-7. On July 20, 1976, Lubell had written Judge Werker, asking leave "to briefly present to the Court's attention certain matters relevant to the determination of the pending motions for summary judgment." On July 28, 1976, Judge Werker's law clerk responded that Judge Werker "will not permit you to submit any additional papers." This response, however, was not received by Lubell until August 10, 1976. At the same time, in the period following July 20, Judge Werker accepted without comment two additional filings by Arya making certain corrections in the reply affidavit.

the earlier affidavit of Dr. Sotoudeh. That affidavit and the admissions that ensued were sufficient to create an issue of fact that reinforced that which Musa Sabi's original affidavit had suggested - i.e., whether ISL "ever validly existed" as a corporation and thus became subject to the automatic dissolution provisions of the 1969 amendments to the Iranian Commercial Code. Thus the inference most favorable to the party opposing summary judgment was that ISL had never been a corporation and thus was not under the reformation requirements of the 1969 Code; it could not have been automatically dissolved for its failure to meet those requirements. And the ultimate inference most favorable to ISL was that it was never more than a general partnership and that Spanos in that capacity would unquestionably have had capacity to manage this antitrust suit. Under the controlling authorities, of course, the material lodged on a summary judgment motion "must be viewed in the light most favorable to the opposing party." Adickes v. Kress & Co., 398 U.S. 144, 157 (1970); and see United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

(c) The court below violated the basic summary judgment maxim that a court "cannot try issues of fact but can only determine whether there are issues of fact to be tried; and, once having determined this affirmatively must leave those issues for determination at a trial." Empire Electronics Co. v. United States, 311 F.2d 175, 179 (C.A. 2, 1962). Thus Judge Werker here resolved factual issues as to the ability of directors

to act as liquidators^{10/} and as to the intent of the directors in giving Spanos special authorization in 1964 to bring suit on behalf of ISL.

CONCLUSION

The summary judgment entered below should be reversed and the case remanded for trial on the merits.

Since this court can make its own determinations as to foreign law, to the extent that it be deemed applicable, this Court should rule that ISL, either as a dissolved corporation or as a general partnership, has the capacity under Rule 17(b) to maintain the antitrust counter-claim. It should also rule that Spanos, either as the one of the last directors and the holder of special authority, or as a general partner, has capacity under Rule 17(b) to continue to manage the anti-trust counter-claim.

Respectfully submitted,

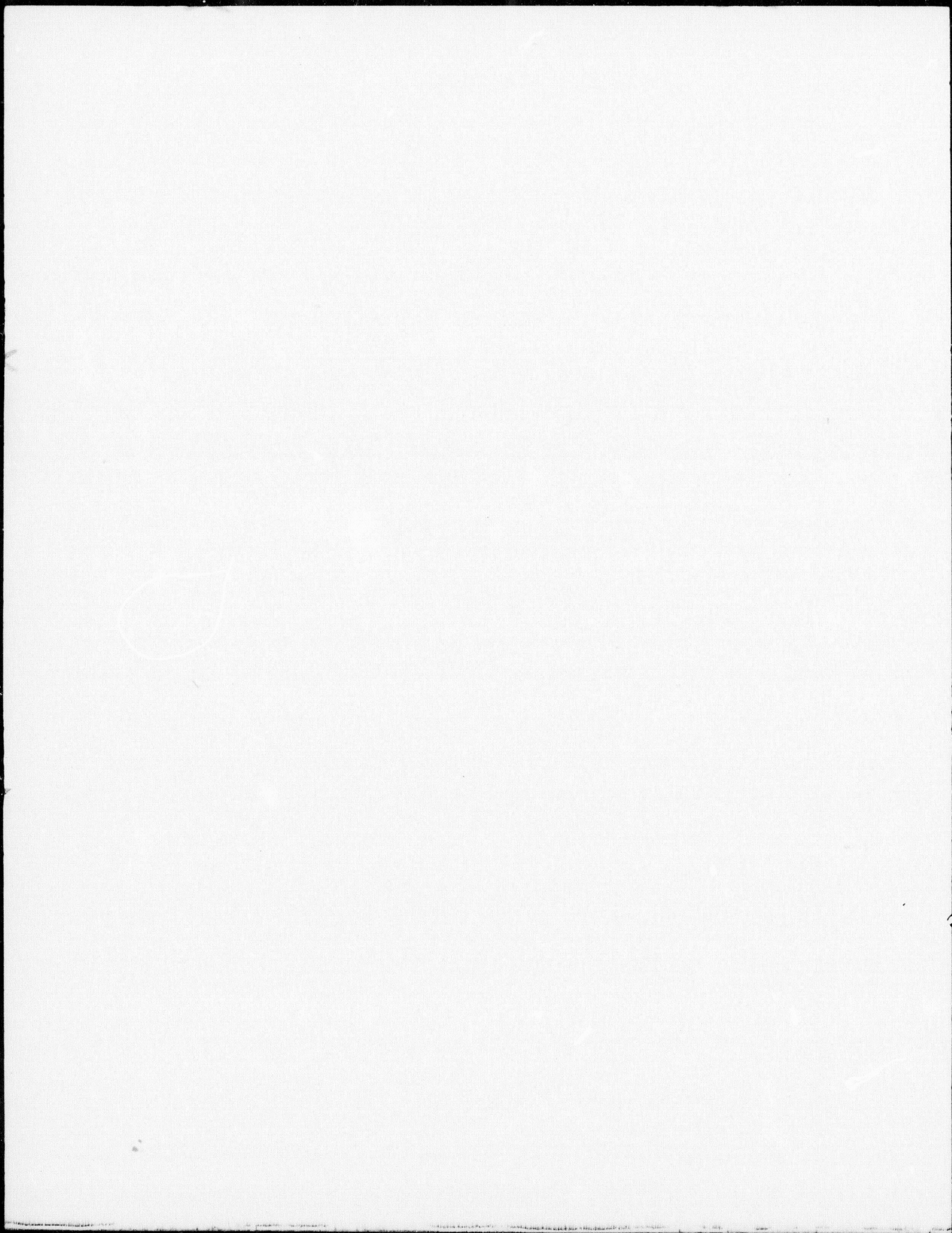
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^{10/} The court admitted, App. 323, that the face of the Code provisions led him to conclude that directors could "carry out" liquidation proceedings. But he concluded otherwise because of Musa Sabi's affidavits. Obviously, an issue of fact was thereby uncovered, which should have precluded summary judgment.



United States Court of Appeals

FOR THE SECOND CIRCUIT

RUDOLPH V. ALOSIO, Plaintiff

IRANIAN SHIPPING LINES, S.A., et al.,
Defendants.

ATLANTIC STEAMERS SUPPLY CO.,
INC. OF PENNSYLVANIA, et al.,
First Intervening Plaintiffs

v.

IRANIAN SHIPPING LINES, S.A., et al.,
Second Defendants

IRANIAN SHIPPING LINES, S.A.,
Cross-Claimant-Appellee

v.

PETER MORAFFES, et al.,
Impleaded Defendants-Appellants

No. 77-7041

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the
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